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Supreme Court, U.S.
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No. 96-1487

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

vs.

HOSEP KRIKOR BAJAKAJIAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether forfeiture of lawfully possessed currency under 18 U.S.C. § 982(a)(1) is unconstitutional under the Excessive Fines Clause of the Eighth Amendment where the crime committed is a mere failure to report transportation of currency, in violation of 31 U.S.C. § 5316.

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OPINION BELOW

The opinion of the Court of Appeals (Petition's App., 1a-14a) is reported at 84 F.3d 334.

STATEMENT OF JURISDICTION

The statement of jurisdiction is set forth with sufficient particularity and accuracy in the brief for the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved is set forth with sufficient particularity and accuracy in the appendix to the brief for the United States.

STATEMENT OF THE CASE

A. The Reporting Requirement Statute

Section 5316 of Title 31, United States Code, provides that an individual is required to file a report when leaving the United States with $10,000 or more. Failure to provide the report exposes that individual to criminal sanctions, pursuant to Section 5322(a) of Title 31, United States Code, in the form of not more than five years imprisonment, a fine of not more than $250,000 and, under Section 982(a)(1) of Title 18, United States Code forfeiture of "any property involved . . . in such offense." Section 5317(c) of Title 31, United States Code also provides for civil forfeiture of any property involved in a failure to report offense.

B. The Offense

On June 9, 1994, Respondent and his wife attempted to

board an Alitalia Airway flight leaving Los Angeles International Airport and destined for Lanarca, Syria via Rome Italy. Unbeknownst to Respondent, his flight was the subject of an examination by a Customs Service canine trained to detect the presence of currency. The canine alighted on appellee's luggage and a search of the luggage revealed $230,192.

A Customs Service Inspector approached Respondent as he and his wife were preparing to board their flight. The inspector explained the currency reporting requirements to Respondent and his wife and asked whether they had in their possession currency in excess of $10,000. Respondent informed the inspector that he had $8,000 in his possession and his wife, $7,000. A search of appellee and his wife further revealed an additional $127,012. After an additional search of Respondent's luggage, the total amount of currency found in his possession was $357,144. The currency was seized and appellee was taken into custody. Respondent was ultimately charged, in a three count Indictment, with 31 U.S.C. § 5316(a)(1)(A), 31 U.S.C. § 5322(a); 18 U.S.C. § 1001; and 18 U.S.C. § 982(a)(1).

In an interview with customs agents after Respondent's arrest for the failure to declare his possession of currency in excess of $10,000, Respondent gave an explanation as to the source of the seized currency. Subsequently, Respondent provided another explanation for the source of the seized funds and, prior to sentencing, provided the Government and court with documentation supporting a third explanation.

C. The Plea

On October 27, 1994, Respondent moved to change his plea of not guilty and entered a guilty plea to count one of the Indictment which charged defendant with 31 U.S.C. §§ 5316(a)(1)(A), 5322(a). Pursuant to the plea agreement, the

Government agreed to dismiss count two at the time of sentencing. The parties also stipulated to having count three, the forfeiture count, tried to the court as a bench trial.

On December 20, 1994, the District Court found that the Government had satisfied its burden that the seized funds were subject to forfeiture and the court invited the parties to submit briefs regarding the amount of forfeiture which was to be decided at sentencing.

D. Sentencing and Forfeiture

At the time of sentencing, the District Court entertained argument regarding what amount of the seized currency should be forfeited, among other sentencing issues unrelated to this Petition.

In reference to the seized currency, the United States Probation Department found that the subject funds were legally obtained and for a lawful purpose. The Government also conceded that Respondent had a legitimate debt in Syria and acknowledged that it had no evidence that the $357,144 are the proceeds of an unlawful activity. However, the Government urged the District Court to apply a proportionality analysis with the burden placed upon Respondent. The government also argued that forfeiture in the case is purely remedial but that, if forfeiture was found violative of the Eighth Amendment, the court may mitigate the amount to be forfeited. The Government then requested the entire amount be forfeited.

Respondent submitted a trial memorandum and supplemental memorandum of law re: forfeiture and judicial discretion under the Eighth Amendment. In these briefs, Respondent explained and provided documentation for the sources of the $357,144, described the purpose for the currency, admitted his crime, and apologized for his transgression.

Respondent, however, urged the court to exercise its discretion and mitigate the mandatory forfeiture provisions of 18 U.S.C. § 982(a)(1).

At the sentencing hearing, the District Court stated,

> I do believe that the United States Currency was in the suitcase and in the carry on luggage for reasons that were not illegal. I do believe that, even though it's a somewhat suspicious and confused story, documented in the poorest way, replete with past misrepresentations, that the funds were — the funds of the defendant, and borrowed funds.
>
> I do believe . . . that the funds were the proceeds of a lawful activity, and that they were to be used for a lawful purpose; to wit, to pay some lawful obligation. . . .

Additionally, the court found, "This wasn't drug money. This wasn't gambling money. This wasn't stolen money. This wasn't money that was being laundered for any reason. That's been proven."

The District Court reached this conclusion after hearing from both the Government and Respondent. The District Court ruled,

> First of all, there is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh, and would violate the Eighth Amendment. And I would not, under the circumstances attain — order the

> forfeiture of the entire $357,000 plus dollars. That would be grossly disproportionate to the offense in questions. The offense, after all, was an important, but nevertheless minor offense, the failure to disclose.
>
> . . . So the amount of forfeiture will be modest, and will be very minor, because in truth, and in fact, I think none should be forfeited. But it will make up for what I think a reasonable fine should be.

Thus, appellee was sentenced to three years formal probation, fined $5,000, and ordered to forfeit $15,000 of the seized currency.

E. The Ninth Circuit Appeal

The Government appealed the District Court's ruling, which the Ninth Circuit affirmed. Focusing on the fact that the currency was lawfully acquired and possessed, the court applied a two prong Excessive Fines Test to the forfeiture in question. Pursuant to the Ninth Circuit's Excessive Fines test, forfeiture is constitutional "if (1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner."

The court held that the currency at issue, lawfully acquired and possessed, was not an instrumentality of the offense and, in so holding, ruled that "[f]orfeiture of currency is unconstitutional when the crime to which forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316."

The court, relying on *United States v. $69,292 in United States Currency*, 62 F.3d 1161 (9th Cir. 1995), refused to find

the seized currency an instrumentality because lawfully acquired and possessed currency lacks "that necessarily close relationship to the crime simply because it has not been reported."

> "Simply put the existence of the currency does not make it an instrumentality. For example, we would not characterize lawfully earned income as instrumentality simply because a taxpayer failed to report that income on his tax return in violation of the tax code. The government would have us stretch the fiction of an 'instrumentality' to the breaking point."

Id. at 1167-68, referring also to *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993) (rejecting expansive definitions as to what qualifies as the instrumentality of a particular crime.)

The court further explained "the money at issue in a § 5316 violation is not contraband, and the money is presumed under the statutory scheme to be lawfully acquired and possessed." Thus, unlike smuggled contraband or a vehicle used to transport contraband, the unreported currency is not an instrumentality of the crime and forfeiture of any amount is violative of the Eighth Amendment's Excessive Fines Clause.

Judge Wallace concurred in the court's result but disagreed with the court's conclusion that the currency was not an instrumentality. Although Justice Wallace felt that the currency was an instrumentality of the offense, he did not believe that the District Court's finding's were clearly erroneous. As such, he would affirm the $15,000 forfeiture.

The Government petitioned for rehearing, with a Suggestion for Rehearing En Banc. This request was denied.

SUMMARY OF ARGUMENT

Forfeiture of Respondent's currency for his failure to report offense violates the Eighth Amendment's proscription against excessive fines. Although Respondent does not contend that forfeiture for a failure to report offense will always be unconstitutional, where the owner of the property can demonstrate that the property sought to be forfeited was possessed lawfully and intended for a lawful purpose, forfeiture should be impermissible.

In its brief, the Government accurately describes this nation's lengthy history of forfeiture, as well as the importance of currency reporting requirements. Respondent does not contest this history, nor does he minimize the importance of the reporting requirement in this nation's efforts to fight crime. A description of this history and importance, however, cannot resolve the issue before this Court. The government fails to recognize the historical importance of the Eighth Amendment's Excessive Fines Clause and those circumstances where the Eighth Amendment dictates a more precise analysis of whether property should be subject to forfeiture.

To determine whether Respondent's currency, or any property, real or personal, should be forfeited to the Government, Respondent contends a two-part analysis should be performed. Initially, the property subject to forfeiture must be deemed an instrumentality of crime and, if such a relationship between the property and offense is found, the property sought to be forfeited must be proportionate to the crime committed.

To be considered an instrumentality of crime for the purpose of forfeiture, the property in question must bear a sufficient nexus to the offense. This nexus must warrant the conclusion that the property was a substantial and meaningful

instrumentality in the commission of the offense. For a determination that the forfeiture is proportionate to the offense, the forfeiture must be commensurate, under the totality of circumstances, with the culpability of the offender.

The main focus of either prong of the instrumentality — proportionality analysis must be on the source and intended use of the property. If the property is found to be lawfully possessed and intended for a lawful purpose, the property cannot be deemed an instrumentality, nor can forfeiture of the property be considered proportionate to the crime committed.

The Government seeks to uphold the forfeiture in this case by arguing that forfeitures of instrumentalities of crime are not excessive. The Government justifies this assertion by claiming that forfeiture of the currency, as an instrumentality, serves important non-punitive, remedial goals and thus, forfeiture is proportionate. This view, however, inappropriately attempts to expand the definition of what constitutes an instrumentality of crime and improperly ignores the punitive aspects of the forfeiture, which punish without any correlation to any damage inflicted by Respondent.

The Government also seeks to uphold the forfeiture here on the basis that the forfeiture of Respondent's currency, as punishment, is proportionate to the offense. This argument, which rests on the theory that Respondent has set his own fine in the amount of undeclared currency and that Congress intended a penalty in the extent of the undeclared currency, must also fail. Such a view fails to address the various factors which must be taken into account when making any proportionality enquiry.

Finally, forfeiture of Respondent's legitimate currency for his failure to report the currency as he was about to leave the country offends our fundamental notions of fairness and equity.

Respondent demonstrated that he lawfully acquired the unreported currency and that the currency was intended for a lawful purpose. The Government never presented any evidence to the contrary. That currency should not, therefore, be forfeited for his violation of a statute aimed at the investigation into and deterrence of narcotics and organized crime activities. The Excessive Fines Clause of the Eighth Amendment must prevent such a result.

ARGUMENT

I.

IN ORDER TO DETERMINE WHETHER A SPECIFIC FORFEITURE VIOLATES THE EIGHTH AMENDMENT A TWO-PART INSTRUMENTALITY-PROPORTIONALITY ANALYSIS SHOULD BE REQUIRED.

The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The view that the Eight Amendment should place limits on the powers of the Government is not new. Indeed, the primary focus of the Eighth Amendment was "the potential for governmental abuse of its 'prosecutorial' power. . . ." *Browning Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) The Eighth Amendment's concern for overzealous prosecutorial conduct led this Court to its recent rulings regarding the applicability of the Excessive Fines Clause of the Eighth Amendment to forfeitures.

This Court has held that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures, whether considered *in rem* or *in personam*. *Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993). In these rulings, however, the question how to apply the Eighth

Amendment to a particular case was left to the lower courts to decide. Implicit, however, in *Austin*, is the consideration of various factors, not just the relationship between the property the offense. *Austin*, at 622, n.15.

In the wake of *Austin* and *Alexander*, numerous Circuits have had the opportunity to establish various tests to determine whether a forfeiture constitutes an excessive fine under the Eighth Amendment. The majority of the Circuits which have addressed the question perform an analysis which purports to balance the severity of the fine, *i.e.*, the forfeiture, with the seriousness of the offense and the culpability of the owner. *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, Cal.*, 59 F.3d 974, 985-86 (9th Cir. 1995); *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1284, 134 L. Ed. 2d 228 (1996); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (adopting a three part instrumentality test which "considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder"), *cert. denied*, __ U.S. __, 115 S. Ct. 1792, 131 L. Ed. 2d 721 (1995); *see also United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1876, 135 L. Ed. 172 (1996); *United States v. Premises Known as RR No. 1 Box 224*, 14 F.3d 864, 876 (3d Cir. 1994) (leaving the question open but suggesting that both the nexus between the property and the offense and the relationship between the value of the forfeited property and the severity of the offense are relevant.); *United States v. 829 Calle de Madero, Chaparral, Otero County, New Mexico*, 100 F.3d 734, 738 (10th Cir. 1996); *Unites States v. One Parcel Real Property Located at 427 & 429 Hall Street*, 74 F.3d 1165, 1170-1172 (11th Cir. 1996). Yet, it is apparent from the cases that no single test has been accepted.

Although no single test has been accepted, an analysis which considers various factors such as that performed in a majority of the Circuits is more appropriate than the Government's insistence that a instrumentality approach is all that is required. The Government's initial position appears to be that if certain property is "used or involved in the commission of an offense", forfeiture of that property will always comport with the Eighth Amendment as a remedial measure. Brief for the United States, p. 10. Respondent agrees with the Government that the forfeiture of contraband as an instrumentality under the Government's analysis serves important remedial, non-punitive goals. *Austin*, at 621, referring to *United States v. One Assortment of 89 Firearms*, 465 U.S. 364 (1984).

This view, however, does not acknowledge the close scrutiny required when the government stands to benefit, *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality opinion.), nor does it recognize the punitive aspects of the forfeiture of Respondent's currency or this Court's criticism of the Government's attempts at expansive definitions of what can be considered an instrumentality. *Austin*, at 621. Even the instrumentality approach suggested in *Austin* provides a more intricate analysis than that proposed by the Government. Austin at 628, (Scalia, J., concurring). Indeed, the Government's assertion that instrumentality forfeitures are not excessive ignores the issue before this Court: what is an instrumentality for the purpose of forfeiture?

A. The Instrumentality Test

In Respondent's view of the correct analysis, property sought to be forfeited must be considered an instrumentality of the crime; there must be a sufficient nexus between the property and the crime. There appears to be no dispute that it is "appropriate to inquire into the degree of relationship that the

property bears to the offense" and that an "incidental or remote relationship between the property [sought to be forfeited] and the offense would not accord with the traditional applications of forfeiture doctrines." Brief for the United States, at p. 19 n.4, citing *Bennis v. Michigan*, 116 S. Ct. 994, 1000 (1996) and *Austin*, 509 U.S. at 627-628. In this apparent agreement, the Government implicitly concedes that which Respondent suggests.

Again, various courts have established different tests to establish whether property sought to be forfeited can be considered an instrumentality of crime. In its excessive fines analysis, the Second Circuit employs a multi-factor approach which entails an instrumentality analysis, focusing on, "the relationship between the offense, including whether the property in the offense was (a) important to the success of the illegal activity, (b) deliberate or planned or merely incidental and fortuitous, and (c) temporally or spatially extensive. . . ." *United States v. Milbrand*, 53 F.3d at 847-848 (1995). In measuring the strength and extent of the nexus between the property and offense, the Fourth Circuit has suggested that the following factors should be taken into account:

> (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of the circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense.

United States v. Chandler, *supra*, 36 F.3d 358, 365, cited with approval in *United States v. Certain Real Property Located at 11869 Westshore Drive*, 70 F.3d 923 (6th Cir. 1995.)

Although the Ninth Circuit failed to explicitly address the specific factors which is considered in its instrumentality analysis, its analysis and conclusion are persuasive. The court focused on the lawfulness of the property subject to forfeiture, Pet. App. 6a, and on the nature of the crime committed, *id.* at 8(a), before it determined that the connection between the property and crime was not sufficiently close to support forfeiture.

The reasoning and logic behind these approaches is sound as each attempts to resolve the issue of whether the property sought to be forfeited has a close enough relationship to the offense. Unless the property itself can be characterized as contraband, forfeiture under the historical fiction that the property itself is tainted is unpersuasive. Under such circumstances, it is only the use to which the property is put which renders it, in some manner, culpable. Thus, a mere statement that the property was "used in" or "involved in" the offense is insufficient and imprecise.

B. The Proportionality Test

Contrary to the Government's assertions, performance of an instrumentality test alone is insufficient to determine whether a forfeiture can withstand scrutiny under the Eighth Amendment. Such a view, which takes into account solely a factual enquiry

into whether property is somehow causally connected to crime, fails to address the extent of the fine imposed on the owner of the property. A complete Eighth Amendment analysis also requires an examination of whether the intended forfeiture is proportionate to the offense committed.

While no list of various factors will be sufficient to weigh the proportionality of a specific forfeiture, an examination of whether a forfeiture is proportionate to the offense is a logical approach to an excessive fines analysis. *See United States v. 9638 Chicago Heights*, 27 F.3d 327, 330-331 (8th Cir. 1994) (expressing dissatisfaction with the application of a pure instrumentality test because such a test fails to take into account the value of the property in monetary terms and the effect the forfeiture would have on innocent residents); *see also United States v. Myers*, 21 F.3d 826, 831 (8th Cir. 1994) (affirming the district court's determination that the forfeiture of defendant's farm although harsh, was not disproportionate to the serious crime for which the defendant was convicted).

Emanating from this Court's holding in *Solem v. Helm*, 463 U.S. 277, 290-92, the proportionality test also has been treated differently in various courts. "Proportionality analysis compares the value of the property to a variety of factors which may include the culpability of the claimant, the gravity of the offense, the relationship of the property to the offense and the harm to the community." *United States v. 11869 Westshore Drive*, 70 F.3d 923, 927, referring to *United States v. 6380 Little Canyon Road*, 59 F.3d 974, 983-985 (9th Cir. 1995). Indeed, an inclusion of a proportionality test "would strike an appropriate balance between curbing judicial discretion and retaining the constitutional norm of proportionality." *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389, 1399 n.23 (citations omitted).

In determining whether the forfeiture is proportionate to

the crime, it is also relevant to examine the legislative history of the statute criminalizing the conduct involved. *See United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1291, (N.D. Ga. 1995), referring to *United States v. One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493 (11th Cir. 1994).

II.

AN APPLICATION OF THE APPROPRIATE ANALYSIS TO THE FORFEITURE OF RESPONDENT'S CURRENCY DEMONSTRATES THAT FORFEITURE VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

Using the appropriate standard, forfeiture of Respondent's currency, for his failure to report that currency, violates the Excessive Fines Clause of the Eighth Amendment. The currency in question consisted of Respondent's savings, combined with that which he borrowed from friends and family. The currency was to be used to repay a lawful debt to another family member. These contentions, which Respondent presented to the Government and District Court, were uncontested. As such, this currency cannot be found to be an instrumentality of a failure to report offense, nor can forfeiture be held proportionate to Respondent's crime.

A. Respondent's Currency Was Not An Instrumentality Of The Crime Of Failing To Report.

This Court has cast doubt on expansive definitions of what can qualify as an instrumentality of crime. *See Austin v. United States*, 509 U.S. at 621, relying on *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1995). In both *Austin* and *One 1958 Plymouth Sedan*, this Court contrasted forfeitures of

contraband against forfeitures of items which were legally possessed but used in the commission of crime. In both cases, this Court also criticized the Government's attempts to characterize property as "instruments." An examination of Respondent's currency, under the instrumentality analysis suggested herein, establishes that the Ninth Circuit was correct when it ruled that Respondent's legitimate currency was not an instrumentality of the failure to report offense.

Respondent's failure to declare the currency was deliberate. The deliberation, however, must be tempered by the fact that Respondent hid the currency out of fear and distrust, not to prevent discovery of booty obtained from illegal activities. The property was not important to the success of any criminal activity. Respondent stood to gain nothing through his failure to report. Certainly, the District Court found that Respondent intended to use the currency for lawful purposes. There was no indication that there was any intention to use the currency in the commission of any other criminal offense. The currency was not contraband, nor was it a smuggled, dutiable item. Furthermore, it was not illegal to take the money out of the country.

Even though the crime could not have been committed but for the existence of the currency, this factor alone should not be dispositive. This factor alone is insufficient to conclude that the currency is an instrumentality of Respondent's failure to provide information.

> Simply put, the existence of currency as a precondition does not make it an instrumentality. For example, we would not characterize lawfully earned income an instrumentality forfeitable as such simply because a taxpayer wilfully failed to report

> that income in his tax return in violation of the tax code. The government would have is stretch the fiction of an "instrumentality" to the breaking point.

Pet. App. 7a.

The Government's reliance on *United States Currency in the Amount of $145,139*, 803 F. Supp. 592 (E.D.N.Y. 1992), *aff'd*, 18 F.3d 73 (2d Cir.), *cert. denied*, 513 U.S. 815 (1994), to establish a circuit-split and to argue Respondent's currency constitutes an instrumentality of a failure to report offense, does not completely address the issue. After the decision in *$145,139*, the Second Circuit established a hybrid, multi-factor excessive fines test. *See All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 501 (2d Cir. 1995) and *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). Given *Milbrand*'s more detailed consideration of the relationship between the property and the offense, *$145,139* cannot be deemed dispositive, even in the Second Circuit.

The Government's reliance on *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) is also misplaced. In *One Lot Emerald Cut Stones*, this Court addressed the issue of whether the Double Jeopardy Clause will bar the civil forfeiture of smuggled goods after an acquittal on the underlying criminal prosecution for customs violations. *Id.* at 235-237. This case presents none of those issues. The sole issue here is whether the forfeiture of legitimate, unreported currency violates the Eighth Amendment's proscription against excessive fines.

The property sought to be forfeited in *One Lot Emerald Cut Stones* was forbidden merchandise and forfeiture served a remedial, non-punitive purpose. *Id.* at 237. The forfeiture of legitimate money involved in undeclared currency violations is

readily distinguishable from the forfeiture of the contraband gems in *One Lot Emerald Cut Stones*. The currency at issue in § 5316 violations is presumed to be lawfully possessed and is not subject to duty; it is not illegal to take the currency out of the country. Such was not the case with the smuggled gems in *One Lot Emerald Cut Stones*.

While the forfeiture of the gems in *One Lot Emerald Cut Stones* constituted the removal of contraband items, such a characterization cannot be made with regard to Respondent's currency. Even though forfeiture of unreported currency may possess, in some applications, the remedial goals of removing drug money, laundered money, or gambling money from those who wish to utilize it for their illicit trades, there are no persuasive arguments that forfeiture of Respondent's currency serves these remedial aims. Forfeiture of Respondent's currency is "a penalty which ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Austin* at 621, citing *United States v. Ward*, 448 U.S. 242, 254 (1980).

B. Forfeiture Of Any Of The Seized Currency Is Disproportionate To The Crime Respondent Committed.

In the District Court, Respondent admitted his violation of failing to report his possession of the currency, but described his crime as less onerous than others. Respondent explained the legitimate sources of and lawful purpose for the seized currency. Additionally, respondent described the context in which he was able to obtain such a large amount of currency, even though little documentation existed. Respondent also explained his falsehoods as fostered by fear, panic, and cultural uncertainty.

With respect to the severity of forfeiture, Respondent explained that the majority of funds were borrowed, and that

the borrowed funds, as well as Respondent's own savings were intended to repay a lawful obligation to family overseas. Respondent contended that if the currency were to be forfeited, not only would he still possess his debt overseas, but he would also continue to be indebted to those from whom he borrowed some of the currency. Hardship to Respondent, thus, is demonstrably severe and, as submitted in the District Court, reaches that draconian level the Eighth Amendment seeks to prevent.

On the other side of the proportionality analysis, an examination of the gravity of the offense demonstrates that, even though the currency crimes have an important purpose, *United States v. $145,139.00*, 803 F. Supp. 592, the gravity of the currency crime at issue here is not as morally contemptible as those cited by the Government for the proposition that forfeiture of the entire amount of seized currency is warranted. Brief for the United States, 14 n.1 (citing numerous narcotics cases in which forfeiture was upheld).

Respondent has never disputed the legitimate and important deterrence and punishment goals the reporting requirements seek to obtain. House Report to the Bank Secretary Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114; H.R. Rep. No. 975, 91st Cong., 2d Sess. 13 (1970). The purpose of the reporting statute, however, is to require reports of foreign transactions where such reports would be helpful. Senate Committee on Banking and Currency, S. Rep. No. 1139, 91st Cong., 2d Sess. 7 (1970). Yet, an examination of the crime committed by Respondent is not that which the reporting requirement seeks to prevent. The gravamen of the crime is not the failure to provide information, but the failure to provide currency information in the commission of narcotics or organized crime activities. The currency statutes "are primarily directed at persons who make a lucrative career in the illicit drug trade and organized crime" and the penalties

serve "to deter and punish such activities." H.R. Rep. No. 98-130, 98th Cong., 2d Sess. 1984.

Respondent's crime does not encompass that which the statute seeks to prevent. The currency was not part of any lucrative career, in narcotics or any other criminal conduct. The currency was legitimately earned and borrowed. The currency was intended to be used to repay a legitimate business debt. No taint, other than Respondent's failure to report, exists. Thus, while the statute Respondent violated is serious, the particular crime Respondent committed is not.

An application of these facts to the appropriate proportionality review demonstrates that forfeiture of the currency in question is grossly disproportionate to the offense and, hence, forfeiture is unconstitutional. Whichever factors are chosen for a proportionality analysis the same conclusion is warranted. Even though Respondent willfully committed the offense, Respondent stood to reap no gain, victimize no-one, and was in possession of nothing illegal. "Quite simply, [Respondent] possessed no culpable intent and had nothing to gain through his failure to report the seized currency." Respondent's Trial Memorandum, at p. 8.

The Government argues that forfeiture of Respondent's currency is perfectly proportionate to the offense because, in essence, Respondent has set his own fine, *i.e.*, the more the amount one fails to report, the more the fine. This claim of direct proportionality must fail. There is no correlation between the amount undeclared and the culpability of the owner; there is no determination of whether the undeclared currency was intended for any illegitimate purposes; and there is no analysis of whether the unreported currency was obtained through illegal activities.

To support forfeiture of Respondent's currency as lawful, the Government relies on Respondent's pre-plea fabrications. Brief for the United States, 31-32. Yet, forfeiture of all of Respondent's currency would still result, in the Government's view, even had Respondent been forthright the moment the currency was discovered. It is disingenuous for the Government to rely on Respondent's fabrication to support forfeiture of currency which they seek under all circumstances.

The Government also contends that, in light of the potential statutory fines which Congress authorized, the forfeiture of the currency cannot be said to be disproportionate. Any measure of proportionality, however, should not be based on a hypothetical amount of a potential fine Respondent could have received. This Court should "reject the government's invitation to traffic in hypothetical. The government wishes the court to use as a yardstick for measuring the seriousness of the offense at issue a federal fine that . . . could have been received. . . ." *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1290; *United States v. Real Property Located at Zamirez Drive*, 845 F. Supp. 725, 732 (C.D. Cal. 1994); *see also United States v. One Parcel of Property Located at Shelly's Riverside Heights Lot X*, 851 F. Supp. 633, 638 (M.D. Pa. 1994) (rejecting comparison of applicable federal fine with value of subject property). Even though Congress may have intended a potential fine for a given offense, proportionality must be based on the facts of a specific case, not conjecture, speculation, or hypotheticals.

III.

FORFEITURE OF PROPERTY WHICH IS LAWFULLY POSSESSED AND INTENDED FOR A LAWFUL PURPOSE SHOULD NEVER SURVIVE UNDER THE SCRUTINY OF AN EIGHTH AMENDMENT CHALLENGE.

The case before this Court, unlike any of those presented in the Brief for the United States, presents a remarkably unique set of circumstances. Never before has a court held that currency, lawfully possessed and intended for a lawful purpose, should be forfeited to the Government because the owner of the property made a mistake in judgment which lacked a criminally culpable intent. In all the cases the Government submitted to this Court, the property sought to be forfeited was involved in illegal activities such as narcotics trafficking, organized crime, or smuggling of dutiable items. Nowhere can the Government point to a case which presents circumstances such as those here.

Respondent contends that there must be a vehicle for legitimate property owners to obtain a return of their lawfully earned property. Whether such a determination is made under an instrumentality or proportionality approach, the Eighth Amendment must serve as the means by which legitimate property may be returned to its owner.

The Government should not under any circumstances be engaged in forfeiting its citizen's legitimate property. While no dispute exists where the powerful tool of forfeiture is used for the illicit trade in narcotics or for the proceeds of organized crime, the Government's forfeiture procedures in this case result in Governmental tyranny that this country's founders sought to prevent.

In this case, the Government seeks for its own coffers currency which was legitimately obtained, lawfully possessed,

and intended for a lawful purpose. This Court should view the Government's efforts with great scrutiny and care. Whether characterized as a forfeiture or fine, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution or deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; [whereas] fines are a source of revenue . . . [i]t makes more sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality opinion.)

Whether considered under an instrumentality approach, a proportionality approach, or a hybrid of the two, forfeiture should never be applied when an individual can successfully demonstrate his property was lawfully possessed and intended for a lawful purpose. Respondent met this burden in the courts below, and his currency must be returned.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the currency seized in this case by the United States should be returned to Respondent.

Respectfully submitted,

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